DEPARTMENT OF INDUSTRIAL RELATIONS
STATE OF CALIFORNIA

DECISION ON ADMINISTRATIVE APPEAL IN RE:

Imperial Prison II, South
PUBLIC WORKS CASE NO. 92-036

I. INTRODUCTION

This decision is in response to an appeal by McCarthy Western Constructors, Inc. from the May 26, 1993, determination of the Director of the Department of Industrial Relations, holding that the off-site fabrication in Arizona of concrete panels to be incorporated into Imperial Prison II, South, is an integral part of the public works project, such that prevailing wage obligations attach. McCarthy contends on appeal[1]: that (a) the determination was legally and factually incorrect, (b) the prevailing law may not be applied to work done outside California under the terms of the Labor Code and the construction contract, (c) the Commerce Clause of the United States Constitution preempts California's ability to enforce the public works law beyond state boundaries, (d) the determination is preempted because it interferes with rights protected by the National Labor Relations Act, (e) the public works law is preempted by ERISA, and; (f) equitable principles require that the determination be reversed.

II. FACTS

A formal complaint on this project was filed by the Center for Contract Compliance ("CCC") on this project on October 26, 1992. The thrust of the complaint is that two contractors on the project, McCarthy Western Constructors, Inc. ("McCarthy") and C. E. Wylie Construction Company ("Wylie"), were using a yard in Arizona to do off-site fabrication of concrete panels to be incorporated into the Imperial Prison II being constructed for the California Department of Corrections ("CDC").

Both the on-site yard for pre-cast concrete panels and the yard McCarthy set up just over the border in Yuma were created exclusively to fabricate the concrete panels. Thus, identical work was being performed on-site[2] and the concrete panels from both sources were used exclusively for the prison project. The bid package to which McCarthy and competing contractors responded, whose terms were eventually was included in the CDC contract, required prevailing wages to be paid in

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1 With the written approval of the Deputy Director, the appeal was allowed after the time specified in 8 California Code of Regulations ("C.C.R.") 16002.5, on the condition that the 14 day extension granted McCarthy would extend the enforcement deadline under LC § 1733.

2 One story interior panels and all other pre-cast material was done in Arizona. Two story-panels, which are much harder to transport and require slightly different forms, were done on-site.

performance of the public work. Contract, Section 00703, subsection 3.4. Such wages were paid by the subcontractor doing the concrete panel fabrication on-site.[3] Prevailing wages were not paid by McCarthy, which presumably made up for the cost of shipping from over the border to the construction site (Yuma, Arizona to Seeley, California) by paying lower wages to the fabricators in Yuma.

McCarthy admitted to the off-site fabrication, but defended its nonpayment of prevailing wages on the basis that the CDC informed it there was no requirement to pay California prevailing wages for off-site work in Arizona. The CDC never contacted the Department of Industrial Relations ("DIR") directly. It acquiesced in McCarthy's decision to do the work in Yuma, Arizona through its construction supervisory firm, Fluor-Daniel. A representative of CDC stated to DIR, after the complaint was filed, that the standard contract clauses do require adherence to the public works laws and that there is no prohibition to fabricating material outside the state. A review of the contract verified these assertions. The CDC representative stated that CDC was unaware of any requirement to pay California's prevailing wage out of state and that it was up to this Department to decide whether this project was a covered public works project. McCarthy claims it sought further clarification from CDC after signing the contract on October 1, 1991, resulting in its being informed that there was no requirement to pay California prevailing wages to out of state employees.

McCarthy also claims that it was informed by Roger Miller, Regional Manager, Division of Labor Standards Enforcement ("DLSE") that there was no requirement to pay prevailing wages to out of state off-site workers. This Department's investigation has found this claim to be inaccurate. See Declaration of Roger Miller, attached.

III. <u>DISCUSSION</u>

A. <u>The Coverage Determination Was Correct</u>

The first question that must be answered is whether, under Labor Code Section 1772, the off-site, out of state fabrication of one story cement interior wall panels integrated into Imperial Prison II is an integral part of the construction project that requires the payment of prevailing wages.

The construction in this case entailed the fabrication of concrete panels to be incorporated into the prison. The yard in Arizona where these panels are fabricated is solely for the purpose of fabricating the panels. The essential test is whether the fabrication off-site is an integral part of the construction.

A California Court of Appeal opinion discussing subcontractor status, <u>O.G. Sansone</u> v. <u>Department of Transportation</u> (1976) 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (hereafter "<u>Sansone</u>") explains this

[3] The claim against Wylie was resolved when CDC agreed that the fabrication work done by Wylie was done at the construction site and that prevailing wages were paid. The CCC never contradicted this fact.

test. Sansone distinguishes subcontractors from independent material men. The drivers held covered in Sansone were taking material from a "borrow pit" which was opened exclusively for and exclusively served the building of a road for the California Department of Transportation. The material was delivered to the site and positioned as needed. The exclusivity of the borrow pit as a second construction activity site, and transport between that and the road, was held sufficient, together with a close integration of the material delivered into the road, to make the drivers covered as working for a "subcontractor."

Here McCarthy contends its employees were not employed on a public works project because the work was performed outside of California. This contention is made despite the facts McCarthy implicitly admits that the yard was created exclusively to fabricate the concrete panels, that identical work was being performed on-site[4] and, that the concrete panels were used exclusively for the prison project. These facts make the off-site fabrication site as highly specific to this project as the "borrow pit" was to the public works project in Sansone. In line with Sansone, past coverage determinations have consistently held that the off-site fabrication of materials at a site whose sole purpose is the fabrication of those materials for a public works site, is a public works itself.[5] McCarthy complains that the site of the fabrication is not "adjacent" to the construction site as stated in the coverage letter of May 26, 1993. McCarthy points out that the yard in Arizona is seventy (70) miles away from the construction site. While there may be a dispute as to whether that distance makes the fabrication yard not adjacent for purposes of a public works determination, this point does not really appear all that relevant to the conclusion reached in Sansone. The integral nature of the work in furtherance of completing the project is the single most important factor of the Sansone analysis. The Director concludes that the walls of the prison are an integral part of the construction of a prison.

B. The California Prevailing Wage Law is Enforceable On Work Done On a California-Sited Project Under The Facts of This Case

1. By Statute

McCarthy contends that because its workers doing the fabrication were outside the state there can be no requirement to pay prevailing wages to them. McCarthy claims that the Labor Code prohibits the interpretation of the Director that those workers should be paid the

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[4] McCarthy contends on appeal that the work is not identical because the on-site fabrication was only for two story exterior panels too large to transport to the site. The one story interior panels and all other pre-cast material was done in Arizona. Given that the fabrication work merely required different forms this distinction does not have merit.

[5] Los Angeles County Transportation Commission, 11/26/86, Southern California RTD Metro Rail/ Cavin's Welding, 4/4/88, Craftsmen Construction, 10/24/88, Off-Site Fabrication, CDC Housing Construction, 10/6/89.

same as the on-site California employees.[6] There is nothing in Labor Code section 1720(a) which indicates that the location of the work is fundamental to the determination as to what is a public works project. While the examples cited by McCarthy, Labor Code sections 1193 and 50.5, deal with wage collection, they do not deal with the payment of prevailing wages. Labor Code section 1720(a) imposes no geographic limitation in its scope. In fact, Labor Code section 1773 specifically avoids the limitation of the state's borders by requiring that the prevailing wage be based on the wages "predetermined for federal public works projects, within the locality and in the nearest labor market area." Labor Code section 1724 specifically states that the county where the public works project is performed is the "locality in which the work is performed" for contracts awarded by the state. The rate to be applied is the rate in effect in the county where the project is built, no matter where the off-site fabrication is done. The Director does not find any specific limitation in Division Two, Part Seven, Chapter One, indicating any such limitation of the scope of the operation of the prevailing wage statutes[7].

The Supreme Court has announced several teachings as to the extraterritorial effect of California laws. Criminal laws are not presumed to reach conduct in a foreign country, despite the involvement of Californians and the beginning and end of the enterprise in the state. People v. Buffum (1953) 40 Cal.2d, 709 (abortion prohibition not enforced where arranged in California but performed in Mexico). However, later cases clarify that the test is the necessity of interpreting an act to reach outside California where that is required for the statutory aim to succeed. For example, the state's interest in preserving fish populations was sufficient to allow extraterritorial enforcement of a statute making it illegal to fish for broadbill swordfish with the assistance of a spotter plane. People v. Weeren (1980) 26 Cal.3d 654, 667, 163 C.R. 255. (Penal section reached beyond 3 mile limit to channel islands.) While these competing principles do not leave the matter free from doubt, the first step is to look to the purposes of the statute, and the second is to look to the extent of extraterritorial reach which would be required here.

The Supreme Court has held that a contractor cannot avoid the payment of prevailing wages even where there was not a contract clause requiring the payment of prevailing wages because the duty to pay prevailing wages is statutory. Lusardi Construction Company v. Aubry (1992) 1 Cal.4th 976, 987, 4 Cal.Rptr.2d 837. Lusardi went on to discuss the purposes of the public works law:

> The overall purpose of the prevailing wage law, as noted earlier, is to benefit and protect employees on

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6 Labor Code section 1720(a) defines public works as "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority."

7 Unlike the Davis-Bacon Act, whose requirements apply only to " mechanics and laborers employed directly upon the site of the work,..." 40 U.S.C. §276a.(a)

public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. These objectives would be defeated if we were to accept Lusardi's interpretation.

> As the facts of this case show, both the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law. To construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law, resulting in payment of less than the prevailing wage to workers on construction projects that would otherwise be deemed public works. To allow this would reduce the prevailing wage law to merely an advisory expression of the Legislature's view. (Id. at 987-988) (Citations omitted.)

Thus, the general public policy considerations discussed by the Supreme Court in Lusardi are directly relevant to this case.

The second step is to look at the extent those policies are relevant to the specific facts here. Seeley and Yuma are, at 70 miles distance, part of adjacent labor markets. The precast concrete forms were made in both locations. That suggests that the purpose of protecting the work-site's labor market is served by enforcing the prevailing wage. Moving a part of the work away from the job site to a lower wage area was seen by all parties as a mid-contract change or innovation. The fact that it was seen as a change from what the contracting parties expected suggests that McCarthy's competitors would hardly have bid against it using the lower labor costs in Yuma, Arizona, rather than those prevailing in the area near Seeley, as required by the contract. Therefore enforcing the prevailing wage for this concrete casting work serves another aim identified in Lusardi, that of having all contractors, California and foreign, union and open shop, bid on a level playing field as far as labor costs. Finally, the language in Lusardi indicates that the California Supreme Court believed that the statute must be enforced to protect California workers from the use of "labor from distant cheap-labor areas." This purpose is served by requiring that all workers employed on public works projects be paid prevailing wages when portions of the work, otherwise done at the site, are moved to a cheap-labor area.[8]

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[8] Labor Code section 1772 states: "[w]orkers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be

In conclusion, McCarthy's objection to California enforcement of labor market rates for a California-sited project, when the casting work has been moved just over the border, falls under the Supreme Court's principles of statutory construction applied in Weeden, supra., more than Buffum supra. Enforcement of a contracted-for wage is a different exercise of state sovereignty than imposing criminal sanctions for acts taking place at a distance in a foreign country. Like Weeden, enforcement is otherwise impractical: Just as the Supreme Court had no difficulty noticing that the coastal stock of swordfish swim heedless of three-mile limits, this record shows that pre-cast concrete panels for California construction sites travel by truck from near-border areas. For those reasons this objection to the determination is rejected on the facts of this case.

2. By Contract

There is no valid argument the contract is not governed by the laws of the State of California. Section 00703, subsection 3.1 specifically requires compliance with all federal, state, county and municipal laws. It seems axiomatic that this provision means that California law, where applicable, governs the contract. This is because compliance with the law of California must include the law governing contracts. McCarthy also ignores the specific language in its contract, Section 00703, subsection 3.4, that explicitly requires the payment of prevailing wages. If McCarthy had rights to contest extraterritorial enforcement, this agreement waived those rights.

C. Commerce Clause Preemption

McCarthy claims that DIR's effort to require the payment of prevailing wages is preempted by the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3, (Congress has the power "[to] regulate commerce with foreign nations, and among the several states, and with the Indian tribes"). McCarthy cites a line of cases having to do with the state as a market regulator.[9] McCarthy completely ignores a more persuasive and relevant line of cases having to do with the state as a "market participant" or exercising a "proprietary interest."

In Hughes v. Alexandria Scrap Corp. (1976) 426 U.S. 794, 96 S.Ct. 2488, the Supreme Court noted "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810, 96 S.Ct., at 2498

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employed upon public work." Labor Code section 1774 states: "[t]he contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract."

9 McCarthy principally relies on Baldwin v. G.A.F. Seelig, Inc. (1935) 294 U.S. 511 and Healy v. The Beer Institute, Inc. (1989) 491 U.S. 324. These cases discuss state regulation of prices of milk and beer, respectively, sold to its citizens, rather than to itself.

(footnote omitted) In Hughes the state of Maryland was found to be free to restrict its subsidy for the purchase of scrap automobiles to in-state purchasers despite the effect on interstate commerce.

Similarly, in Reeves, Inc. v. Stake (1980) 447 U.S. 429, 100 S.CT. 2271, the Supreme Court found that South Dakota was free to restrict sales from a state owned and operated cement plant to state residents. As noted in Reeves, *supra*:

> The basic distinction drawn in Alexandria Scrap between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. The precedents comport with this distinction. (Citations omitted.) (*Id.* at p. 436-437.)

The present case is very similar. The State of California is contracting for the construction of a prison. It is paying public funds to private contractors to perform the construction. It has required the payment of prevailing wages to "all workers employed on public works." Labor Code section 1771. Under the analyses of Reeves and Hughes the state is free to require the payment of prevailing wages to all workers employed on the project without regard to any potential violation of the Commerce Clause.[10]

A similar analysis would flow even under the Privileges and Immunities Clause of the U.S. Constitution (art. IV, § 2, cl.3). ("The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.") Because the State of California is not attempting to limit employment to its own citizens, it is merely requiring that all workers employed on a public work receive the appropriate prevailing wage. This case presents a situation that is directly the opposite of any attempt to require the hiring of state residents on public works projects in violation of the Privileges and Immunities Clause. See Laborers Local Union No. 374 v. Felton Construction Company (1982) 654 P.2d 67, 98 Wash.2d 121, Robinson v. Frances (1986) 713 P.2d 259. These cases dealt with attempts to require that a certain percentage of state residents be employed on public works projects in Alaska and Washington,

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[10] As noted in Reeves:
Alexandria Scrap does not stand alone. In American Yearbook Co. v. Askew 339 F.Supp. 719 (MD Fla. 1972), a three-judge District Court upheld a Florida statute requiring the State to obtain needed printing services from in-state shops. It reasoned that "state proprietary functions" are exempt from Commerce Clause scrutiny. This Court affirmed summarily. 409 U.S. 904, 93 S.Ct. 230, 34 L.Ed.2d 168 (1972). Numerous courts have rebuffed Commerce Clause challenges directed at similar preferences that exist in "a substantial majority of the states." (*Id.* at p 437, fn. 9, Citations omitted.)

respectively. The Supreme Court in each state struck down the legislation as a violation of the Privileges and Immunities Clause. The State of California is not doing anything to prevent non-residents from performing work on public works projects, it is merely requiring that they be paid the same as state residents. While this may have the effect of encouraging contractors on California financed public projects to hire state residents or otherwise perform the work in California, it does not require it. As noted above, a state acting as a market participant may do just that.

D. National Labor Relations Act Preemption

The next preemption argument is that section 7 of the National Labor Relations Act ("NLRA") (29 U.S.C.A. section 157) somehow preempts the state public works law. The reasoning in the argument is that the state is attempting to interfere with a collective bargaining agreement in violation of the NLRA. The activity of the Director in determining this project a public works project and requiring the payment of prevailing wages does not interfere with the existing collective bargaining agreement. "States possess broad authority under their police powers to regulate the employment relationship within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . . are only a few examples." Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 756, 105 S.Ct. 2380.

Further, the case relied on by McCarthy[11] deals with an attempt by the Division of Apprenticeship Standards to prevent the imposition of a collectively bargained for wage decrease. This case deals with an attempt by McCarthy to use out of state labor and pay less than the prevailing wage McCarthy contractually and statutorily must pay. This distinction is more fully explained below.

The NLRA contains two separate preemption principles. The Garmon prong protects the primary jurisdiction of the NLRB to determine if conduct by labor or management is either prohibited or protected by the NLRA. San Diego Building Trades Council v. Garmon (1959) 359 U.S. 236, 79 S.Ct. 773. The Machinists prong of preemption prohibits interference by the state in activity which Congress intended to be unregulated, leaving the resolution at conflict to be resolved by the interaction of labor and management. Machinists v. Wisconsin Employment Relations Comm'n (1976) 427 U.S. 132, 96 S.Ct. 2548.

A more recent Supreme Court case further defined the preemptive scope of the NLRA. In the Metropolitan Life Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 105 S.Ct. 2380 case, the Supreme Court considered whether the NLRA preempts a state law mandating that minimum health care benefits be included in insurance policies. In Metropolitan Life, the Supreme Court held that minimum state employment standards which affect union and non-union employees equally, and which neither encourage or discourage the collective-bargaining process are not pre-

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11 Bechtel Construction, Inc. v. Carpenters (9th Cir. 1987) 812 F.2d 1220.

empted by the NLRA. *Id.* at 755. The Supreme Court further stated that:

> "*Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part designed to give specific minimum protections to individual workers and to ensure that each employee covered by the act would receive . . . coverage. Id. at 755. (Emphasis in the original.)*

The Court concluded in Metropolitan Life that there was no preemption under the Machinists doctrine either, since the requirements at issue therein applied to all employees, without regard to whether they were or were not represented by a union, and the statute did not have the effect of either encouraging or discouraging collective bargaining. The NLRA is concerned with protecting the collective bargaining process and not with the specific substantive terms that might emerge from the bargaining process.

Because of the fact that California's public works laws apply generally to all employers regardless of any collective bargaining agreement, the California statute constitutes a true minimum employment standard under Metropolitan and is not preempted by the NLRA.

McCarthy's reliance on Bechtel Construction Inc. v. United Brotherhood of Carpenters (9th Cir. 1987) 812 F.2d 1220 is misplaced. Bechtel is factually and legally distinguishable from this case and its holding is not controlling.

The primary focus in Bechtel was whether under state law (more specifically, California Labor Code § 229), California Apprenticeship Council-approved wage rates for apprentices superseded collectively bargained wage rates. Only after concluding that the Council-approved apprentice wage schedule deferred to the rates negotiated by the employer and the union *under California law* did Bechtel also state, as an alternative and secondary ground for its decision, that the NLRA also preempted any state assertion of a right to set private wages. Here, unlike the state regulation at issue in Bechtel, all contractors on a public works project are required to pay prevailing wages.

The Bechtel Court found that since the wage for apprentices could be undercut through the collective bargaining process, the regulations could not be a state minimum labor standard. *Id.* 1226 McCarthy does not claim that this argument is true for the California workers on the project. The fact that McCarthy has agreed to pay the presumably higher California wage to all workers employed on a California public works project does not undercut the collective bargaining process in any manner whatsoever. The state is enforcing a minimum employment standard for public works projects protected under Metropolitan Life.

Further, a case more on point than Bechtel, involving the New York public works law (New York Labor Law section 220) has specifically held that the NLRA does not preempt state public works laws (General Electric Co. v. New York State Department of Labor (2d Cir. 1989) 891 F.2d 25:

> Insofar as the relationship between section 220 and the NLRA is concerned, we agree with the district court that the State statute has not been preempted by the federal. *See Fort Halifax Packing Co. v. Coyne, 482 U.S.1, 20, 107 S.Ct. 2211, 2222, 96 L.Ed.2d 1 (1987)* (" [T]he NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining."); *Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755, 105 S.Ct. 2380, 2397, 85 L.Ed.2d 728 (1985)* ("Minimum state labor standards affect union and non-union employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA."). (*Id.* at 27.)

Most recently, the Supreme Court has affirmed the view that the National Labor Relations Act cannot be applied to a state exercising a "proprietary interest" in a publicly funded construction project. Building and Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., et al. (1993) 113 S.Ct. 1190, 122 L.Ed.2d 565, "[p]ermitting the States to participate freely in the marketplace is . . . consistent with NLRA pre-emption principles."

There is no reason to conclude that the public works statutes are preempted by the NLRA. A coverage determination on the project will interfere with the terms of the collective bargaining agreement. A contractor must agree to pay the same wage to all workers employed on a public works project. The fact that it elects to use out of state workers subject to a different collective bargaining agreement rather than in state workers does not directly interfere with the collective bargaining agreement.

E. Employee Retirement Income Security Act ("ERISA") Preemption

McCarthy next contends that the California Public Works Law is preempted by the Employee Retirement Income Security Act ("ERISA"). 29 U.S.C.A. section 1144(a). McCarthy cites Hydrostorage v. Northern California Boilermakers Local Joint Apprenticeship Committee (9th Cir. 1989) 891 F.2d 719, 729, cert. denied, 498 U.S. 822, Local Union 598 Plumbers & Pipefitters Industries Journeymen and Apprenticeship Training Fund v. J.A. Jones Construction Co. (9th Cir. 1988) 846 F.2d 1213, aff'd mem. 488 U.S. 881, and General Electric Co. v. New York State Department of Labor (2d Cir. 1989) 891 F.2d 25, cert. denied 496 U.S. 912. Each case is clearly distinguishable from the present case. The Director does not seek to regulate a plan as the term is used in ERISA. The Director does seek to enforce the prevailing wage applicable to a California public works project.

Hydrostorage held that a state administrative order requiring employer to participate and contribute to apprenticeship program under state law "related to" employee benefit plan for purposes of Employee Retirement Income Security Act's preemption clause.. Hydrostorage struck down the since amended prevailing wage statute, as it applied to ERISA plans, because that statute attempted to impose certain requirements on ERISA plans. Here, the Director only seeks to enforce the statutorily required and agreed upon prevailing wage.

Similarly, in Local Union 598 Plumbers & Pipefitters Industries Journeymen and Apprenticeship Training Fund v. J.A. Jones Construction Co. (9th. 1988) 846 F.2d 1213, the Court of Appeals held that the Washington statute, insofar as it required contributions to apprenticeship training fund at rate in excess of that provided by collective bargaining agreement, was preempted by ERISA. The California statutes and regulations do not purport to regulate a plan by mandating any particular level of benefits. California merely requires that the prevailing rate applicable to California public works projects be paid. The employer may pay the prevailing wage rate all in cash should it choose to without regard to any benefits or may take credit for benefits paid against the prevailing wage. (See California Labor Code section 1773.1 and 8 C.C.R. 16200(a)(3)(I).) The California public works law is much more flexible than the statutes at issue in Jones. That flexibility avoids any ERISA conflict. As noted in Associated Builders and Contractors v. Curry(N.D. Cal. 1992) 797 F.Supp. 1528, 1536-1537 ,"by including the value of prevailing 'employer payments' for benefits, the statutes do not mandate that bidders provide such benefits, only that they provide the value thereof."

General Electric Co. v. New York State Department of Labor (2d Cir. 1989) 891 F.2d 25, is distinguishable as well, that case dealt with New York's law mandating certain supplements as part of the actual prevailing wage. As explained above the California public works statutes do not attempt to do this.[12]

Finally it should be noted that one recent Federal District Court decision has held that ERISA does not preempt the state public works law. Associated Builders and Contractors v. Curry (N.D. Cal. 1992) 797 F.Supp. 1528:

> ERISA does not, therefore, preempt section 1771. The determination of prevailing wages for public works projects, and the requirement that contractors pay them, lies squarely within the state's exercise of its traditional police powers. The fact that prevailing wage levels are calculated in part by reference to the value of prevailing benefits does not mean that the prevailing wage statutes "relate to" or "purport to regulate" ERISA benefit plans

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12 As modified, General Electric Co. v. New York State Department of Labor 936 F.2d 1448, 1461 (2d Cir. 1991), actually allows for certain non-ERISA supplements to be mandated by state law.

under the standards articulated by the Ninth Circuit in Martori Brothers and other cases. (*Id.* at 1537)

F. Equitable Principles

Finally, McCarthy argues that the initial determination of the Director should be vacated on equitable grounds. In short, McCarthy contends that since it asked both CDC and DIR whether there was a requirement to prevailing wages and was told there was no such requirement,[13] it should not now be required to pay California prevailing wages to the Arizona workers. As discussed earlier, the Director does not credit McCarthy's assertions as to these communications.

McCarthy also ignores the fact that only the Director of Industrial Relations has authority, in the first instance, to determine what is a covered public works project. As stated in Lusardi Construction Company v. Aubry (1992) 1 Cal.4th 976, 4 Cal.Rptr.2d 837:

> These statutes establish a legislative intent to give the Director plenary authority to promulgate rules to enforce the Labor Code. Although no statute expressly gives the Director the authority to make regulations governing coverage, such authority is implied . . . . Under the regulations, issues of coverage of the prevailing wage law are determined by the Director or the DLSE as the Director's designee . . . . [W]e hold that the Director's interpretation of his statutory authority is reasonable and that the Director has the power to determine that a construction project is a "public work." *Id.* at 844-845. (Citations omitted.)

McCarthy made no effort to request a formal coverage determination from the Director or his designee, as is specifically allowed by Labor Code section 1773.4 and 8 C.C.R. 16100(a). It chose instead to rely on equivocal representations of the awarding body and an informal and equally equivocal oral opinion from an employee of the Department (See Declaration of Roger Miller). As also noted in Lusardi at p. 849:

> We agree that in a proper case equitable considerations may preclude the imposition of statutory penalties against a public work contractor for failing to pay the prevailing wage. This is such a case. Here, Lusardi acted in good faith in entering into the contract on the basis of the

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13 Actually, both state agencies said something a little different. CDC said that it was unaware of any requirement to pay prevailing wages but, reminded McCarthy of it's responsibilities under the contract. DIR said, orally, through a district manager, that it would have difficulty enforcing the requirement out of state. See Exhibits 3 and 4 of the Declaration of Hurst filed with the Appeal and Declaration of Miller (attached).

> District's representations, assertedly on the advice of its attorneys, that the project was not subject to the prevailing wage law. Under the circumstances of this case it would be inequitable for Lusardi to be held liable for penalties for failure to pay the prevailing wage. Lusardi's exposure to liability must be limited to the amount of underpayment.

While McCarthy may have some equitable claim for relief based on the representations of the CDC as to any penalties that might be assessed, there is no basis to conclude that the public works determination must be vacated because of any misapprehension of applicable law that McCarthy may have suffered.[14]

Even if there were a basis for concluding that McCarthy is entitled to some form of relief based on an estoppel theory. That relief should not be the denial of wages to the Arizona workers performing work in connection with the project. McCarthy may proceed to file a claim against DIR with the California Board of Control. This assures McCarthy that an agency other than either DIR or CDC will decide the validity of its claim.

IV. CONCLUSION

The off-site fabrication work performed by McCarthy at its sole use facility in Arizona meets the test for a public works project under Sansone. There is a statutory duty to pay prevailing wages enforceable by DIR in this case under Lusardi no matter where the work is performed. There is no Commerce Clause preemption of public works laws. There is no National Labor Relations Act or Employee Retirement Income Security Act preemption of public works laws. There is no basis to grant McCarthy the equitable relief it seeks in requesting the withdrawal of the determination. This matter is referred to the Labor Commissioner for enforcement.

DATED: 4/5/94

Lloyd W. Aubry, Jr., Director

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[14] As held in Lusardi, estoppel will not stand in the face of a statutory duty to pay prevailing wages. Lusardi Construction Company v. Aubry (1992) 1 Cal.4th 976, 994, 4 Cal.Rptr.2d 837. This is true in this case because DIR has no privity or identity of interest with CDC in enforcing the prevailing wage law. See, Lusardi, supra, at p.995.